STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ALAN JESPERSON,

Plaintiff-Appellant,

-vs-

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.
_____/

Supreme Court No. 150332

Court of Appeals No. 315942

Macomb County Circuit Court No. 11-006160-NO

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Court Rules

STATEMENT REGARDING QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT DEFENDANT COULD NOT BE DEEMED TO HAVE WAIVED AN UNPLEADED AFFIRMATIVE DEFENSE BECAUSE THE COURT OF APPEALS WOULD HAVE GRANTED DEFENDANT THE RIGHT TO AMEND ITS AFFIRMATIVE DEFENSES?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

Ii. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION BASED ON THE ONE-YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1) SINCE, PRIOR TO THE DATE MR. JESPERSON FILED THIS CASE, THE DEFENDANT HAD PAID HIM PERSONAL PROTECTION INSURANCE BENEFITS?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Alan Jesperson was involved in a vehicular accident on May 12, 2009, when the motorcycle he was riding was rear-ended by a car being driven by Matthew Badelalla. Mr. Jesperson developed back and shoulder pain as a result of the accident.

Mr. Badelalla was insured by Auto Club Insurance Company (ACIA). On June 2, 2010, slightly over one year after the accident, Mr. Badelalla reported the accident to ACIA after he received a letter from an attorney representing Mr. Jesperson.

In August 2010, ACIA mailed to Mr. Jesperson's attorney an application for no-fault benefits which Mr. Jesperson was to fill out. Mr. Jesperson completed that application on September 20, 2010 and that form was faxed to ACIA's offices the following day. (App. 17a-25a).

Beginning on September 27, 2010, ACIA began paying no-fault benefits to Mr. Jesperson. Over the nine months that followed, ACIA paid more than $22,000.00 in no-fault benefits to Mr. Jesperson. (App. 26a-43a).

In December 2010, Mr. Jesperson filed a third-party negligence action in the Macomb County Circuit Court against Mr. Badelalla, his employer, and the owner of the vehicle Mr. Badelalla was driving on May 12, 2009.

The month after Mr. Jesperson filed his negligence case, ACIA scheduled an independent medical examination conducted by Dr. Paul J. Drouillard. Based on a report written by Dr. Drouillard after that examination, ACIA determined that it was no longer obligated to pay no-fault benefits to Mr. Jesperson. On April 12, 2011, ACIA notified Mr. Jesperson that it was terminating the payment of these benefits effective April 25, 2011.

Mr. Jesperson responded to this termination of no-fault payments by moving to amend his

Macomb County case to add ACIA as a defendant. On May 16, 2011, Mr. Jesperson filed a Second Amended Complaint adding ACIA as a defendant and claiming that ACIA was wrongfully refusing to pay no-fault benefits. (App 44a-51a).

In June 2011, ACIA filed its Answer and Affirmative Defenses to the Second Amended Complaint. (App 52a-59a). In responding to Mr. Jesperson's complaint, ACIA claimed a number of affirmative defenses. Among these affirmative defenses was that any expenses incurred more than one year before suit was filed against ACIA were not recoverable under the one-year-back rule of MCL 500.3145(1). Thus, ACIA claimed as an affirmative defense:

> That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1).
>
> Affirmative Defense #3 (App 57a).

In the nineteen month period that followed the filing of this answer, Mr. Jesperson and ACIA litigated this case. Discovery was conducted, case evaluation took place and the parties went to facilitation in an unsuccessful attempt to resolve their differences.

The trial on Mr. Jesperson's claim against ACIA were scheduled to begin on February 19, 2013. Less than three weeks before that trial date, ACIA filed a motion for summary disposition. In that motion ACIA argued for the first time that Mr. Jesperson's claim was barred by the one-year limitations period provided in MCL 500.3145(1).

In response to ACIA's motion, Mr. Jesperson raised two arguments. First, he argued that this case was exempted from MCL 500.3145(1)'s one-year limitations period because ACIA had paid Mr. Jesperson over $22,000.00 in no-fault benefits between September 2010 and April 2011. Thus, Mr. Jesperson claimed the benefit of MCL 500.3145(1)'s language indicating that the one-year

limitations period provided in that statute did not apply where "the insurer has previously made a payment of personal protection insurance benefits for the injury."

Mr. Jesperson's second argument in response to ACIA's summary disposition motion was that under the court rule governing the pleading of affirmative defenses, MCR 2.111(F), ACIA had waived any right to claim the limitations period in MCL 500.3145(1) by failing to raise it properly.

ACIA's motion for summary disposition was heard by the circuit court on the date that the case was set for trial, February 19, 2013 (App. 60a-76a). The circuit court ruled from the bench on that date that Mr. Jesperson's claim was subject to the one-year statute of limitations set out in MCL 500.3145(1) and it dismissed Mr. Jesperson's case on that basis. (App 74a-75a). A written order granting ACIA's motion for summary disposition was entered on February 19, 2013. (App 77a).

In granting the motion for summary disposition on the basis of §3145(1), the circuit court did not address the second argument that Mr. Jesperson raised in response to ACIA's summary disposition motion. Thus, the circuit court did not consider the question of whether ACIA had waived any defense predicated on §3145(1)'s limitations period by failing to properly plead it as an affirmative defense.

Mr. Jesperson moved for reconsideration of the circuit court's February 19, 2013 order. That motion was denied in an Opinion and Order dated April 9, 2013. (App. 78a - 81a).

Mr. Jesperson appealed the dismissal of his no-fault claim to the Michigan Court of Appeals. On appeal, he raised the same two issues that he had argued in opposition to ACIA's request for summary disposition. First, he contended that the one-year limitations period of §3145(1) was inapplicable where, as here, ACIA made various payments of no fault benefits prior to the date that he filed his case. Second, he contended that ACIA had waived any statute of limitations defense by

failing to raise it in its affirmative defenses.

The Court of Appeals issued a published decision addressing these arguments on September 16, 2014. (App 82a-97a). *Jesperson v Auto Club Ins Ass'n,* 306 Mich App 632; 858 NW2d 105 (2014). In that opinion, a two person majority of the Court of Appeals affirmed the circuit court's grant of summary disposition. With respect to the statute of limitations issue, the Court of Appeals majority ruled that §3145(1)'s exception to the one-year limitations period where "an insurer has previously made a payment of personal protection insurance benefits for the injury," was inapplicable here because, in its view, that exception only applied where the insurer made those payments within one year of the date of the accident. Thus, the majority held in its September 16, 2014 opinion:

> We conclude from this plain statutory language that the Legislature intended that the word "previously" mean previous to "1 year after the date of the accident causing injury." This interpretation is supported by the fact that the Legislature juxtaposed "previously" with "1 year after the date of the accident causing injury," which language thus appears much closer in proximity to the word "previously" than does the Legislature's earlier reference to the commencement of "[a]n action." This interpretation also is supported by two principles of statutory construction: our directive to avoid interpretations that result in absurd consequences, and our directive to avoid interpretations that render portions of a statute nugatory. See *Detroit Int'l Bridge Co v. Commodities Export Co,* 279 Mich.App 662, 674; 760 NW2d 565 (2008); *Robinson v. City of Lansing,* 486 Mich. 1, 21; 782 NW2d 171 (2010). To hold, as plaintiff suggests, that any payment made by an insurer would revive a stale claim, no matter how much time has elapsed, would render an absurd result by allowing, potentially, even decades-old claims to be asserted. Further, such an interpretation would essentially eliminate the limitations period of MCL 500.3145(1) in cases where an insurer has ever paid anything on a claim, rather than providing a limited exception that allows for the filing of suit more than one year after the accident in certain circumstances. We decline to adopt plaintiff's preferred interpretation, which we find would be in contravention of the "Legislative purpose in the No–Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably" and to "protect against stale claims and protracted litigations." *Pendergast v. American Fidelity Fire Ins Co*, 118 Mich.App 838, 841–842; 325

NW2d 602 (1982).

306 Mich App at 644-645.

As to Mr. Jesperson's waiver argument based on MCR 2.111(F), the Court of Appeals majority ruled that any failure on the part of ACIA to plead the one-year limitations period of MCL 500.3145(1) as an affirmative defense would be excused because the majority ruled that it would allow ACIA to amend its affirmative defenses:

> However, leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless such amendment would be futile or otherwise unjustified. *Lewandowski v. Nuclear Mgt*, 272 Mich.App 120, 127; 724 NW2d 718, 723 (2006). Thus, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading, in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff's claim. Given the trial court's discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. Accordingly, we find no waiver of the affirmative defense of statute of limitations.

Id., at 647.

Judge Deborah A. Servitto dissented from the majority's ruling on the waiver issue. *Id*., at 648-653.

Mr. Jesperson applied for leave to appeal in this Court. On April 1, 2015, the Court issued an order granting his application for leave to appeal. (App 98a). *Jesperson v ACIA*, 497 Mich ___; 861 NW2d 47 (2015). The Court indicated in its April 1, 2015 order:

> The parties shall include among the issues to be briefed: (1) whether the defendant adequately raised the affirmative defense of the one-year statute of limitations stated in MCL 500.3145(1) without explicitly describing it in its answer to the plaintiff's amended complaint; (2) if not, whether the Court of Appeals erred in rejecting the plaintiff's argument that the defendant waived the affirmative defense by pointing to the trial court's authority to exercise its discretion to allow the defendant to amend its answers; and (3) if the defendant did not waive the statute of limitations defense,

whether its payment of benefits to the plaintiff more than one year after the date of the accident satisfied the second exception to the one-year statute of limitations established in the first sentence of §3145(1).

(App 98a).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT DID NOT WAIVE ITS STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD AS REQUIRED BY MCR 2.111(F).

The first issue on which the Court requested briefing in its April 1, 2015 order granting leave to appeal concerns ACIA's failure to preserve its statute of limitations defense by failing to raise it properly in its affirmative defenses.

The Michigan Court Rules specify that a party against whom a case is filed "must assert in a responsive pleading the defenses the party has against the claim." MCR 2.111(F)(2). The court rules further specify that, except for the question of subject matter jurisdiction, "[a] defense not asserted in the responsive pleading . . . as provided by these rules is waived." *Id.*

The Michigan Court Rules also contain a specific provision with respect to affirmative defenses, MCR 2.111(F)(3). That subrule provides:

> *Affirmative Defenses*. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.
>
> *Id*.

MCR 2.111(F)(3) does not merely require that a defendant *identify* a potential defense in its list of affirmative defenses. Rather, that subrule specifically requires that a responding party state *the facts* that form the basis for an affirmative defense. It is also noteworthy that the court rules pertaining to the pleading of affirmative defenses is written in mandatory language. A party *must* assert all defenses under MCR 2.111(F)(2), all affirmative defenses *must* be stated in a party's first responsive pleading, MCR 2.111(F)(3), and the separate list of affirmative defenses *must* include a statement of the facts constituting such a defense. MCR 2.111(F)(3).

The language contained in a Michigan Court Rule is subject to the same rules of construction as that of a statute. *Marketos v American Employers Ins. Co.,* 465 Mich 407, 413; 633 NW2d 371 (2001); *McAuley v General Motors Corp.*, 457 Mich 513, 518; 578 NW2d 282 (1998). If a court rule is clear and unambiguous as written, no amount of interpretation is necessary and the rule is to be enforced according to its plain language. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2003); *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Here, the language in MCR 2.111(F)(2) and (3) is clear and unambiguous.

A party's failure to comply with the mandatory language of MCR 2.111(F)(3) results in the waiver of any affirmative defense not raised in that party's initial response. *Campbell v St. John Hospital*, 434 Mich 608, 615; 455 NW2d 695 (1990); *Citizens Insurance Company of America v Juno Lighting, Inc.*, 247 Mich App 236, 241; 635 NW2d 379 (2001); *Harris v Vernier*, 242 Mich App 306, 330; 617 NW2d 764 (2000); *Cole v Ladbroke Racing Michigan, Inc.*, 241 Mich App 1, 8; 614 NW2d 169 (2000). This Court has specifically recognized that a party "waives a statute of limitations defense by failing to raise it in his first responsive pleading." *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008).

ACIA did not properly preserve a limitations defense based on §3145(1). ACIA claimed no defense based on the one-year limitations period contained in that statute. ACIA did raise an affirmative defense based on the one-year-back rule of that statute, but it did not assert that Mr. Jesperson's claim for recovery was barred by the one year statute of limitations in §3145(1).[1] Answer and Affirmative Defenses, No. 3. (App 57a). *Cf Joseph v ACIA*, 491 Mich 200, 214-215; 815 NW2d 412 (2012) (characterizing the one-year-back rule as a "damages" limiting provision," not a statute of limitations). MCR 2.111(F)(2) is explicit as to the effect of ACIA's failure to properly raise that statute of limitations defense. That defense has been waived.

In its September 16, 2014 opinion, the Court of Appeals majority indicated that since §3145(1)'s one-year-back rule was included in ACIA's affirmative defenses, it was "arguable" that plaintiff "was made aware of the limitations period of that statute and not unfairly surprised by defendant's assertion of the defense." 306 Mich App at 647. However, the question for purposes of MCR 2.111(F) is not whether plaintiff was or was not aware of the one year statute of limitations contained in §3145(1). The question, instead, was whether ACIA in its affirmative defenses stated the facts sufficient to support a defense based on §3145(1)'s statute of limitations. ACIA stated no such defense.

Indeed, the manner in which ACIA posed the only defense that it raised under §3145(1) - the one-year-back rule - completely negated the notion that AICA was actually claiming that Mr. Jesperson's case was barred by that subsection's statute of limitations. In stating its claim to the one-

[1]ACIA also raised in its affirmative defenses a specific statute of limitations issue quite apart from §3145(1). It claimed in its affirmative defenses that any work loss claim that Mr. Jesperson might pursue was barred by the three year statute of limitations provided in MCL 500.3107. Affirmative Defense #4 (App. 57a).

year-back rule, ACIA's affirmative defense began, "*since notice was given, or payment has been previously made*," Mr. Jesperson could only recover for the unpaid benefits that had accrued in the one year period before the filing of his case." Answer and Affirmative Defenses No. 3. (App 57a) (emphasis added). Thus, not only did ACIA fail to affirmatively claim a defense based on the one-year limitations period of §3145(1), *it even explained in its affirmative defenses why no such defense was available to it - because it had previously made payment of no fault benefits to Mr. Jesperson.*

To suggest under these circumstances that Mr. Jesperson was "arguably" put on notice of ACIA's intent to resort to the one year limitations defense in §3145(1) is not merely legally irrelevant, it is ridiculous. In actuality, the explicit "notice" that ACIA provided to Mr. Jesperson in its affirmative defenses was that it would *not* be asserting a statute of limitations defense based on §3145(1) precisely because one (or both) of the exceptions to the one-year limitations period was met in this case.

In any event, the Court of Appeals majority did not appear to ground its decision with respect to ACIA's waiver of its §3145(1) limitations defense on the question of whether Mr. Jesperson was "put on notice" of ACIA's intent to raise such a defense. Instead, the Court of Appeals majority relied on even more dubious reasoning in concluding that there was no such waiver.

The Court of Appeals majority noted that ACIA's failure to include this limitations defense among its affirmative defenses could be corrected by amendment. The Court of Appeals majority observed that "the trial court . . . could have, in *its* discretion, granted defendant leave to amend its pleading . . ." 306 Mich App at 647 (emphasis added). Thus, the Court of Appeals recognized that the circuit court possessed the discretion to allow an amendment of ACIA's affirmative defenses. However, after acknowledging the discretion that rests with the circuit court in deciding a request

to amend, the Court of Appeals majority offered the following baffling resolution of the waiver issue presented in this case: "Given the trial court's discretion . . . we see no need to remand the case for the trial court to do just that." *Id*. While recognizing that it was the trial judge who possessed the discretion to grant or deny an amendment of ACIA's affirmative defenses, the Court of Appeals took it upon itself, "in the interest of judicial efficiency," to exercise the trial court's discretion and it "granted" ACIA leave to amend its affirmative defenses. Thus, the majority's September 16, 2014 opinion ended with the following sentence: "*we find* no waiver of the affirmative defense of statute of limitations." 306 Mich App at 647 (emphasis added).

The Court of Appeals majority exhibited a fundamental misapprehension of the role of an appellate tribunal in the review of discretionary decisions entrusted to circuit court judges. The Court of Appeals obviously *reviews* circuit court discretionary decisions. The Court of Appeals, however, does not *make* these discretionary decisions in place of the circuit court.

It was for the circuit court in this case to determine whether to allow amendment of ACIA's affirmative defenses. The circuit court failed to make that determination as it did not even address Mr. Jesperson's argument predicated on MCR 2.111(F). If the circuit court had addressed an ACIA request to amend, that decision would have been reviewable by the Court of Appeals under the deferential abuse of discretion standard. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 53; 684 NW2d 320 (2004); *Wormsbacher v Phillip R. Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

In the absence of a circuit court decision on a request to amend ACIA's affirmative defenses, the Court of Appeals majority had nothing to review. Its review role was limited to determining whether the circuit court abused its discretion in granting or denying such a request. Since the circuit

court never exercised that discretion, it was impossible for the Court of Appeals to determine whether that discretion has been appropriately exercised and it was equally impossible for the Court of Appeals to give the circuit court's decision-making the deference it is due. *cf Johnson v Cornet*, 423 Mich 304, 328, fn. 14; 377 NW2d 713 (1985).[2]

The Court of Appeals majority viewed its usurpation of the circuit court's discretionary decision-making as somehow furthering "the interest of judicial efficiency." 306 Mich App at 647. This is not a question of "judicial efficiency." It is, instead, a question of the appropriate role of an appellate court in reviewing a decision that is entrusted to the discretion of the circuit court. The circuit court in this case might well have come to the conclusion that a defendant who proceeds through discovery, case evaluation and facilitation and who waits nineteen months after being sued to raise a limitations defense on the eve of trial is not particularly deserving of the right to amend its affirmative defenses to claim a defense that it had previously conceded. The circuit court could well have been moved to reach this result and deny a request to amend. It is absolutely irrelevant that two members of the Michigan Court of Appeals were willing to reach a different result and allow such an amendment.

The two person majority of the Court of Appeals blatantly erred in making a decision that was not theirs to make. Recognition of the appropriate role of the Court of Appeals demands that the discretionary decision regarding any right to amend must rest with the circuit court. The Court of Appeals usurpation of the circuit court's role should be reversed.

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[2]The fact that the Court of Appeals majority had no discretionary decision to review demonstrates that it necessarily decided to grant the amendment of ACIA's affirmative defenses *de novo*.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT MR. JESPERSON'S CAUSE OF ACTION WAS BARRED BY THE ONE YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1).

This substantive issue presented in this case involves the appropriate interpretation of MCL 500.3145(1), the provision of the no-fault act containing a one-year limitation period for the filing of any claim for benefits under that act. That subsection provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

This case concerns the first two sentences of §3145(1). That section's first sentence begins with a general statement of the limitations period: an action for no-fault benefits "may not be commenced later than 1 year after the date of the accident . . ." That general statement of the limitations period is, however, subject to two exceptions, both introduced with the word "unless." A case commenced more than one year after the accident is barred:

> unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.

The second sentence of §3145(1) specifies that, if "a payment has been made" by a no-fault insurer, a plaintiff may bring suit within one year from the date that the most recent allowable

expense was incurred.

There is no question here that Mr. Jesperson did not name ACIA in a suit for no-fault benefits within one year of the date of the accident. There is also no question that the first of the two exceptions to the one year limitations period is inapplicable here since Mr. Jesperson did not provide written notice to ACIA within one year of the accident.

However, prior to the date that Mr. Jesperson instituted this action, ACIA made a series of payments of no-fault benefits to him. It was on the basis of these payments and the second exception to the one-year limitations period provided in §3145(1) that Mr. Jesperson argued below that his claim was timely filed. The Court of Appeals rejected Mr. Jesperson's argument. It held that this second exception to the one-year statute of limitations only applies where an insurer's payment of no-fault benefits occurs within one year of the date of the accident. Because ACIA did not begin paying no-fault benefits to Ms. Jesperson until September 2010, sixteen months after the accident, the Court of Appeals ruled that his claim was barred by the one-year limitations period of §3145(1).

By requiring that payments of no-fault benefits must be made within one year of the accident to trigger the exception to the one-year limitations period of §3145(1), the Court of Appeals read into the first sentence of §3145(1) a requirement that simply was not placed there by the Legislature. Contrary to the conclusion reached by the Court of Appeals, this Court has already summarized how this statute operates under the text chosen by the Michigan Legislature. In *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), overruled by *Regents of University of Michigan v Titan Ins Co*, 487 Mich 289; 718 NW2d 784 (2006), overruled by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012), this Court noted:

Thus, an action for PIP benefits must be commenced within a year of the accident

> unless the insured gives written notice of injury *or previously received PIP benefits from the insurer. If notice was given or payment was made, the action can be commenced within one year of the most recent* loss. Recovery, however, is limited to losses incurred during the year before the filing of the action.
>
> 476 Mich at 61. (emphasis added).

The *Cameron* Court's summary of how §3145(1)'s one-year limitations period operates was correct. If a plaintiff has previously received payment of no-fault benefits, an action to recover unpaid benefits may be commenced within one year after the plaintiff's most recent loss. There is no additional requirement that the payment of benefits be made within one year of the accident.

A closer examination of the text of §3145(1) confirms the accuracy of the *Cameron* Court's observations. The general one-year statute of limitations of §3145(1) gives way in two circumstances, either where the plaintiff provides written notice of injury within one year of the accident *or* where the insurer has previously made a payment of benefits. The use of the disjunctive "or" in separating these two exceptions to the one-year limitations period is significant.

The use of the disjunctive "or" indicates "a disunion, a separation, an alternative." *People v Kowalski*, 489 Mich 488, 499, n. 11; 803 NW2d 200 (2011), *cf Baker v General Motors (After Remand)*, 420 Mich 463, 496; 363 NW2d 602 (1984); *People v Pfaffle*, 246 Mich App 282, 297; 632 NW2d 162 (2001). Thus, under standard principles of statutory interpretation, the two exceptions to §3145(1)'s one-year limitation period must be construed as completely independent of the other. As expressed in a primary treatise on the interpretation of statutes, "[t]he disjunctive 'or' usually, but not always, separates words or phrases in the alternative relationship, indicating that *either of the separated words or phrases may be employed without the other.* The use of the disjunctive usually indicates alternatives and *requires that these alternatives be treated separately*." 1A Sutherland

Statutory Construction (7th ed), §21-14 (emphasis added); *cf Century Surety Co v Charon*, 230 Mich App 79, 83; 583 NW2d 486 (1998) (two subsections of a statute separated by the disjunctive "stand[] independent" of each other); *Carlson v City of Troy*, 90 Mich App 543, 549; 282 NW2d 387 (1979).[3]

The independent character of the two exceptions to the one-year limitation period of §3145(1) is of importance here because only one of these two exceptions makes specific reference to the one-year period after the accident. Thus, §3145(1)'s first sentence exempts from the one-year limitations period those situations in which written notice of the injury has been provided to the insurer "within 1 year of the accident."

Notably, this reference to the time period one year after the accident in the "written notice" exception to the statute of limitations is absent from the entirely separate and independent second exception that comes into play in this case. Quite obviously, the Legislature could have drafted this "payment" exception to the one-year statute of limitations with the same temporal limitation it imposed in the "written notice" exception. The Legislature could have indicated that the one-year limitations period applied, "unless the insurer has *within 1 year of the accident* made a payment of personal protection insurance benefits for the injury." But, that is not what the Legislature did in drafting the first sentence of §3145(1). Instead, it provided an exception to the statute of limitations where an employer has "previously" made a payment of no fault benefits.

Since Michigan courts "may not assume that the Legislature inadvertently made use of one

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[3]In the brief that it filed in this Court in response to Mr. Jesperson's application for leave to appeal, ACIA criticized Mr. Jesperson's interpretation of §3145(1), claiming that it read the second exception to the one-year limitation period "in isolation, without reference to the preceding [clause]." Def's Answer to Application, at 2. This argument overlooks the fact that, under basic principles of statutory interpretation, the Legislature's use of the disjunctive "or" in §3145(1) *dictates* that the two exceptions to the one-year statute of limitations be read "in isolation."

word or phrase instead of another," and because courts have a duty "to give meaning to the Legislature's choice of one word over the other," *Robinson v City of Detroit*, 462 Mich 439, 459, 461; 613 NW2d 307 (2000), the only logical conclusion to be drawn from the two exceptions to §3145(1)'s one-year statute of limitations is that the Legislature's use of the word "previously" in the second exception to the one-year limitations period has to mean something different from the phrase "1 year after the accident" contained in the clause that precedes it. *See also People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012); *Pohutski v City of Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). The Court of Appeals majority, however, reached precisely the opposite conclusion.

The Court of Appeals majority expressly rejected the basic principle of statutory interpretation embodied in *Robinson*. After noting the differences in the language in §3145(1)'s two exceptions to the one-year statute of limitations, it reached the conclusion that "in the context of this statute, we conclude that the two phraseologies mean precisely the same thing. The Legislature was not required to use identical terminology in crafting the two exceptions." 306 Mich App at 645. This analysis is seriously flawed.

While general principles of interesting expository writing might counsel use of two different phraseologies to express identical concepts, the same thing cannot be said in the field of legislative draftsmanship. In that setting, where precision really matters, if a legislative body means to express the same thing, it must use the same terminology for the simple reason that, as this Court's decision in *Robinson* attests, courts are compelled to give effect to differences in statutory terminology.

Thus, what the Court of Appeals majority did in this case was to take the temporal limitation that is contained in the "notice" exception to the statute of limitations and transpose that same

temporal limitation - one year after the accident - on §3145(1)'s second exception despite the fact that this exception does not contain such a temporal limitation. The Court of Appeals majority's approach, therefore, runs afoul of this Court's decisions which have held that "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993); *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). That is precisely what the Court of Appeals did in this case.

The Court of Appeals majority chose to ignore the first exception altogether except to note in passing that it does refer to the one-year period after the accident. 306 Mich App at 642. Removing that first exception left the Court of Appeals majority with the following:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury . . . unless the insurer has previously made a payment of personal protection insurance benefits for the injury.

The majority elected to have the word "previously" refer back to the phrase "1 year after the date of the accident," thus arriving at the conclusion that the no fault payments triggering this exception had to be made within one year of the accident. The majority offered no explanation as to why the adverb "previously" would not be read in tandem with the verb that is used in the preceding clause, "commenced."

MCL 500.3145(1) is a statute of limitations. And, like most other statutes of limitations in Michigan law, this particular statute of limitations is written in terms of when a cause of action must be *commenced*. *See also* MCL 600.5805(1); MCL 600.5807; MCL 600.5808. There is no reason why the adverb "previously" should not be read together with the operative verb used in §3145(1)

in this and most other statutes of limitations. Such a reading renders the following entirely logical interpretation of the first sentence of §3145(1): An action for recovery of no fault benefits may not be *commenced* outside the statutorily prescribed period of limitations "unless the insurer has previously made a payment of personal protection insurance benefits for the injury." In other words, as this Court indicated in *Cameron*, "an action for PIP benefits must be commenced within a year of the accident unless the insured gives written notice of injury or previously received PIP benefits from the insurer." 476 Mich at 61.

Not only is this an entirely reasonable rendering of the first sentence of §3145(1), it is the only one that fits the express language of the second sentence of that statute, a sentence that the Court of Appeals majority overlooked entirely in its analysis.

The second sentence of §3145(1) both reinforces and adds an additional element to the two exceptions to the statute of limitations identified in the prior sentence. That second sentence states: "If the notice has been given or *payment has been made*, the action may be commenced at any time within 1 year after the most recent allowable expense . . . has been incurred." (emphasis added). There is, obviously, no temporal limitation on the "payment" mentioned in this second sentence of §3145(1); that sentence does not state that a case may be filed one year after the last allowable expense if payment of a no fault benefit was made *within one year after the accident*.

The fact of the matter is that Mr. Jesperson's cause of action was timely filed on the basis of the *second* sentence of §3145(1). In light of that fact, it was particularly inappropriate for the Court of Appeals to strain to read the first sentence of §3145(1) in such a way as to conflict with the clear language of that subsection's second sentence.

Finally, the Court of Appeals majority suggested that its reading of the first sentence of

§3145(1) was necessitated by the need to avoid an absurd result. 306 Mich App at 644-645. Assuming for the moment that the "absurd results" doctrine remains a viable interpretive tool in the rendering of statutes, *cf Johnson v Recca*, 492 Mich 169, 192-193; 821 NW2d 520 (2012), the Court of Appeals majority seriously missed the mark with the suggestion that the interpretation of §3145(1)'s literal text as proposed by Mr. Jesperson somehow reaches an absurd result.

The Court of Appeals majority offered the view that the interpretation proposed by plaintiff was "absurd" because it would "essentially" eliminate the statute of limitations in claims for no fault benefits and would, in the majority's view, be in contravention of the policy behind the no fault act. Before examining the Court of Appeals majority's analysis of the "policy" or "purpose" behind the no-fault act, it must be stressed that "[t]his Court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). Thus, it is the literal text of §3145(1) discussed above that governs the issue before this Court, not the "policy" behind the no-fault act as construed by the Court of Appeals majority.

The Court of Appeals ruled that a decision in Mr. Jesperson's favor would contravene the purpose of the no-fault act - "encouraging claimants to bring their claims to court within a reasonable time . . ." 306 Mich App at 644. This is a particularly hollow critique of Mr. Jesperson's legal position. In point of fact, there is both a statute of limitations and a damage limitation contained in §3145(1) that completely eliminates the "absurd" results that the majority imagined.

The second sentence of §3145(1) represents a statute of limitations that would still remain in effect even under the interpretation of that statute that Mr. Jesperson has offered. That second sentence specifies that where, as here, no-fault benefits have previously been paid, a case must still

be commenced within one year of the most recent allowable expense.

But, even more important in avoiding the "absurdity" that the Court of Appeals majority envisioned is the effect of the one-year-back rule of §3145(1). That statute specifically provides that "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date in which the action is commenced." The Court of Appeals majority ruled that adoption of Mr. Jesperson's position would contravene the no-fault act's policy to "protect against stale claims." 306 Mich App at 694. The upshot of the one-year-back rule of §3145(1) is that, with or without a statute of limitations governing such actions, not a single no-fault insurer will ever be called upon to defend against "stale" claims since the farthest back that such a case could reach in terms of the damages to be awarded is one year before suit was filed. Moreover, the one-year-back rule of §3145(1) guarantees that, with or without a statute of limitations, no claimant will ever be encouraged to sit on his/her legal rights for an extended period of time before bringing suit to recover no-fault benefits.

Whether the Court of Appeals resort to the absurd result doctrine is entitled to any weight is open to serious question. But, even if this is an appropriate interpretative tool, the fact remains that "[t]here is no need for this Court to address the 'absurd results' doctrine in this case because there is simply no result here that is absurd." *Joseph*, 491 Mich at 217, fn. 38.

For each of these reasons, this Court should reverse the Court of Appeals majority's interpretation of §3145(1)'s "payment" exception to the one year limitations period provided in that subsection. Because this case was commenced after "the insurer . . . previously made a payment of personal protection insurance benefits . . ." and it was filed within one year of the most recent allowable expense, Mr. Jesperson's cause of action was timely.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Alan Jesperson, respectfully requests that this Court reverse the Court of Appeals September 16, 2014, decision and remand this matter to the Macomb County Circuit Court for further proceedings.

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